

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JUL 12 1999

PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WYATT B. WILLARD,

Defendant-Appellant.

No. 98-4159
(District of Utah)
(D.C. No. 98-CR-122-1)

ORDER AND JUDGMENT*

Before **TACHA, McKAY**, and **MURPHY**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Wyatt B. Willard appeals from the district court's entry of judgment and sentence on his guilty plea to armed bank robbery in violation of 18 U.S.C.

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

§ 2113(a) and (d). Willard asserts that the United States breached its plea agreement when it refused to recommend to the district court a sentence at the low end of the sentencing range. In its appellate brief, the United States concedes error and requests that Willard's sentence be vacated and the case remanded to the district court for resentencing. Based on the arguments set forth in Willard's appellate brief and the United States' concession of error, this court exercises jurisdiction pursuant to 28 U.S.C. § 1291, **VACATES** Willard's sentence, and **REMANDS** the case to the district court for resentencing. Although Willard disclaims any desire to be resentenced before a different judge, under the particular facts of this case, we leave that determination to the district court on remand. *See United States v. Brye*, 146 F.3d 1207, 1213 (10th Cir. 1998).

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge